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No. 84-519

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CLARK OIL & REFINING CORPORATION,
Petitioner,

vs.

LEHMAN BROTHERS KUHN LOEB, INC.,
Respondent,

and

UNITED STATES OF AMERICA,
Intervenor.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner, Clark Oil & Refining Corporation,[1] submits this Reply to Respondent's Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner on September 29, 1984. In the Petition for Writ of Certiorari Petitioner seeks review of the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered July 11, 1984, and reported as *Lehman Brothers Kuhn Loeb, Inc. v. Clark Oil & Refining Corporation,* 739 F.2d 1313 (8th Cir. 1984) (en banc).

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[1] The parent company of Petitioner, Clark Oil & Refining Corporation, is Apex Holding Co., a Missouri corporation. Non-wholly owned subsidiaries of said Petitioner are Southcap Pipe Line Company, Shicap Pipe Line Company, Wolverine Pipe Line Company and Westshore Pipe Line Company, all Delaware corporations.

ARGUMENT

I. The Magistrate Erred in Granting Respondent's Motion for Summary Judgment Under Rule 56 Fed.R.Civ.P. Inasmuch as the Record Shows that There Are Genuine Issues as to Material Facts.

Respondent, Lehman Brothers Kuhn Loeb, Inc., in its Brief in Opposition to Petition for Writ of Certiorari ("Brief in Opposition"), makes a serious and material misrepresentation of the position of Petitioner, Clark Oil & Refining Corporation, regarding the issue of summary judgment now before this Court. Respondent states in its Brief in Opposition that "[i]n the district court the Petitioner contended that there were no issues of material fact and that this case was ripe for summary judgment." (Respondent's Brief in Opposition, p. 6). This is purely and simply an untrue statement. In point of fact, Petitioner contended at the district court level that Respondent failed to demonstrate the undisputed facts necessary to entitle it to a summary judgment as a matter of law.[2]

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[2] Defendant's Reply to Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment, p.10, filed with the Magistrate in the district court, summarizes Petitioner's position throughout these proceedings, as follows: "...Defendant submits that Plaintiff has fallen far short of demonstrating the undisputed facts required to entitle it to a judgment as a matter of law. This is, perhaps, best illustrated in the context of Plaintiff's argument that certain of its services were not retainer services but rather agency activities such as would entitle it to its claimed commission. In order to prevail, Plaintiff must have this Court blindly accept that [Plaintiff's] activities were pursued in furtherance of commission obligations rather than in exchange for retainer payments. On the other hand, Defendant contends, in part, that assuming, *arguendo,* [Plaintiff's] activities were carried out in an attempt to justify its receipt of a commission, those activities were simply insufficient to justify the conclusion that [Plaintiff] acted as [Defendant's] agent. Thus, it is clear that Plaintiff has ignored a crucial *factual* question which would have to be resolved in its favor before its requested relief could be accorded."

While Respondent consistently maintained that all facts were undisputed, these facts related strictly to services for which Respondent was, without question, paid under the terms of the agreement at issue. At no time, as Petitioner clearly argued at the district court level, did Respondent set forth or even attempt to set forth the undisputed facts sufficient to support Respondent's argument that it acted as Petitioner's agent so as to entitle it to a commission under the terms of said agreement. Respondent simply did not present a case ripe for summary judgment and Petitioner certainly never conceded that point in the district court.

CONCLUSION

The Petition for a Writ of Certiorari should be granted to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit affirming Respondent's Motion for Summary Judgment against Petitioner.

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Dated: November 13, 1984